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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1981

No. ———

ANTHONY MICHAEL CARLONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRIEDBERG & PETERSON
William M. Orth
100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626
Counsel for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals may reinstate an indictment, dismissed because the defendant was not tried within the limits of the Speedy Trial Act, on the ground that 18 U.S.C. §3162(a)(2)—the mandatory dismissal provision of the Speedy Trial Act—allows "windfalls for lawbreakers" absent deliberate government misconduct or serious prejudice to the defendant.

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The Petitoner, Anthony Michael Carlone, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered in these proceedings on December 23, 1981.

Respectfully submitted,

FRIEDBERG & PETERSON
By: William M. Orth
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626
Counsel for Petitioner

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as United States v. Anthony Michael Carlone, et al., 666 F.2d 1112 (7th Cir. 1981).

JURISDICTION OF SUPREME COURT

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 23, 1981.

A Petition for Rehearing was filed with the United States Court of Appeals for the Seventh Circuit, and was denied by Order dated January 29, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.

Jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked pursuant to 18 U.S.C. §3731.

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals may reinstate an indictment, dismissed because the defendant was not tried within the limits of the Speedy Trial Act, on the ground that 18 U.S.C. §3162(a)(2)—the mandatory dismissal provision of the Speedy Trial Act—allows "windfalls for lawbreakers" absent deliberate government misconduct or serious prejudice to the defendant.

STATUTES INVOLVED

18 U.S.C. §3161(c)(1). In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing

date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. §3161(h)(3)(A), (B). The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: * * *

(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

18 U.S.C. §3161(h)(8)(A), (C). The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: * * *

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request

of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

* * *

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

18 U.S.C. §3162(a)(2). If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; and the impact of a reprosecution on the administration of this Chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea

of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. §3161(h)(1)(I):

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * *
>
> (I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit, which reversed a decision of the United States District Court for the Northern District of Illinois dismissing an indictment by reason of violation of the Speedy Trial Act (18 U.S.C. §3161 et seq.).

Petitioner and his co-defendants[1] were indicted on August 8, 1980, in a seven count Indictment charging violation of a number of federal criminal statutes arising out of the arson of a warehouse in Copenhagen, Denmark on September 18, 1975. Arraignment of all defendants on this original Indictment was completed on August 27, 1980; however, a Superceding Indictment was returned on September

[1]Co-defendants on appeal below were Avie Cohen and Leonard Bednarz.

18, 1980, identical to the original Indictment except that two original unindicted co-conspirators were now named. Arraignment on the Superceding Indictment took place on October 14, 1980.

In November, trial was scheduled to commence on January 5. 1981. However, on December 12, 1980, the government moved for a continuance to February 23, 1981, based upon their representation that two "critical" Scandinavian witnesses refused to come to the United States to testify, and therefore it would be necessary to take their depositions in Scandinavia. The government mentioned in passing at the hearing but did not rely, as it would on appeal, on the "essential witness" provision of 18 U.S.C. §3161(h)(3)(A). Neither petitioner nor his counsel were present at this appearance; therefore, subject to petitioner's agreement, trial was continued to May 18, 1981, with the court finding that the period of delay was excludable under the Speedy Trial Act. When notified of the continuance, petitioner objected and trial was therefore re-scheduled for January 26, 1981.

At the next hearing, December 22, 1980, the government moved for a continuance to May 18, 1981, based upon the unavailability of another Scandinavian witness and the difficulty in scheduling depositions with counsel for the co-defendants. Based upon the government's representations, the court ordered the depositions to be taken by January 30, 1981, and entered its finding that the period of delay was excludable under the Speedy Trial Act. The court specifically found that the delay was excludable under the "ends of justice" provision of 18 U.S.C. §3161(h)(8)(A). Furthermore, the court cautioned the government to exercise due diligence, and avoid delay:

> "You have got to have the depositions done by then [Jan. 30, 1981], so start, now, arranging them. We just can't put this over four months, five months, in order to get three depositions abroad."

On January 30, 1981, the court learned that the foreign depositions had not been taken as ordered. Nor had they even been scheduled. The only due diligence shown was by petitioner's counsel who alerted the prosecutor that he would travel to Scandinavia to take the depositions upon 48 (forty-eight) hours notice. Based upon the lack of government action regarding the depositions, petitioner requested that the court reconsider the continuance granted on December 22, 1980; however, the court did not rule upon this request at this hearing. The district court did find, however, that the government was not acting with the due diligence required for an "ends of justice" continuance under 18 U.S.C. §3161(h)(8)(A) and described "the leisurely, foot-dragging approach of the government [which is] totally inconsistent with the purpose of the Speedy Trial Act."

The next hearing occurred on February 10, 1981. The government had finally filed its motion to depose foreign witnesses, which was granted. Petitioner's request to reconsider the December 22, 1980 continuance was summarily denied. The court found that the delay was excludable "in the interest of justice" under the Speedy Trial Act, in order for the government to obtain the testimony of the foreign witnesses. The district court repeated its findings, however, that the government had not acted with due diligence.

> "I made some remarks critical of the Government's speed in getting this case ready for trial, the last time. I don't have to repeat them, but I haven't been disabused of my notion that the Government has not been diligent . . ."

Trial was therefore set for May 11, 1981.

By May 11, 1981, petitoner had renewed his objection to the original December 22, 1980 continuance and the government had finally filed a motion for the judicial approval necessary to taking foreign depositions. Because of the court's disapproval of the form of the government's motion, that motion and petitioner's motion to reconsider the continuance were both continued to May 22, 1981, with the court finding that this further delay was also excludable under the Speedy Trial Act, noting that with the time which had already passed, this further period of delay would make little difference to the final determination on the merits.

The final hearing took place on May 22, 1981. At this hearing, the government offered several reasons for failing to schedule the foreign depositions the need for which had constituted the basis for delays now over five months long. Each of these asserted justifications were rebutted either by evidence or case law submitted by petitioner, and the district court specifically found that none of the government's asserted reasons constituted a basis for excludable delay under the Speedy Trial Act.

> "The reasons that were given to me for excluding the time between the January 5th trial date, have in fact turned out to be non-reasons . . . The conduct of the Government in the preparation of this case can by no stretch of the imagination be described as diligence."

The district court therefore granted petitioner's motion to reconsider the original order granting a continuance on December 22, 1980, and found that the period of the continuances, expressly conditioned on government due diligence continuously found lacking over five months, could

no longer be treated as excludable time under the "ends of justice" provision of 18 U.S.C. §1361(h)(8)(A). With the 70 day limit of 18 U.S.C. §3161(c)(1) now clearly expired, the district court dismissed the Indictment per the mandate of 18 U.S.C. §3162(a)(2).

The government appealed. The United States Court of Appeals for the Seventh Circuit reversed the district court's order dismissing the Indictment on the ground that the government was not guilty of deliberate misconduct in failing to obtain the foreign depositions and that the petitioner suffered no serious prejudice from the delays. Furthermore, the Court of Appeals remanded the case to a different judge.

Rehearing en banc was denied and this petition for certiorari follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Sixth Amendment Attack

The Sixth Amendment of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

Congress enacted the Speedy Trial Act of 1974 (18 U.S.C. §3161, *et. seq.)* to translate the Sixth Amendment right to a speedy trial into a timetable workable for prosecutors, judges and defense counsel. The legislative history of the Speedy Trial Act is replete with agreement that mandatory dismissal of an Indictment (18 U.S.C. §3162) would be the only way to make the Sixth Amendment right a reality.

> "Section 3162 is the heart of the speedy trial requirement/ or rather, the teeth. . .
>
> "If we are serious about implementing a requirement of trial within 60-120 days after arrest, we must provide sanctions that have some teeth. Mere exhortations or inducements are unlikely to be effective."

Prepared Statement of Representative Abner J. Mikva. 1971 Senate Hearings 128-29.

> "Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill."

Then Assistant Attorney General William H. Rehnquist, quoted by Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41794-95.

To further illustrate the seriousness of Congress in implementing mandatory dismissal, the original effective date of 18 U.S.C. §3162 (July 1, 1979) was moved back one year pursuant to 18 U.S.C. §3163(c), as amended by P.L. 96-43, 93 Stat. 327, 328-29 (1979), in order to allow the Justice Department time to prepare for the severe sanction.

This Court helped guarantee an accused's Sixth Amendment right to the assistance of counsel through the requirement of the Miranda warning. Congress attempted to help guarantee an accused's Sixth Amendment right to a speedy trial through imposition of the mandatory dismissal provi-

sion of 18 U.S.C. §3162 of the Speedy Trial Act. What the Seventh Circuit has done in this case is tantamount to ruling that the Miranda warning should be a suggestion and not a requirement. For what the Seventh Circuit has done is to make optional the mandatory dismissal sanction of 18 U.S.C. §3162. In a back-handed way, the Court of Appeals has violated petitioner's Sixth Amendment right to a speedy trial by refusing to apply the mandatory dismissal provision that Congress enacted to remove the guesswork from guaranteeing that right.

However unwittingly, the Court of Appeals has grafted onto the mandatory dismissal provision of 18 U.S.C. §3162 prerequisites for application not found in the Speedy Trial Act. Deliberate government misconduct or serious prejudice to the defendant are not preconditions under the Act for applying 18 U.S.C. §3162. Nor does the Act apply solely for the benefit of non-"lawbreakers."

The Court of Appeals' reference to "windfalls for lawbreakers" (666 F.2d at 1116), distasteful as it is to the presumption of innocence, is even more offensive to the Sixth Amendment. For it is not the Court of Appeals' misunderstanding of the Speedy Trial Act that is the problem. The problem is the Court of Appeals' blindness to the constitutional underpinnings of the Act. As such, the opinion below will chill the Sixth Amendment right to a speedy trial for every person standing "accused" of a federal crime because every assistant United States Attorney will use the opinion to escape mandatory dismissal under 18 U.S.C. §3162.

Dismissal in the district court under 18 U.S.C. §3162 is a token gesture. Congress' intent for the Speedy Trial Act has been frustrated and the Sixth Amendment right to a speedy trial remains an urealistic goal.

B. Misinterpreting the Speedy Trial Act.

The instant case involves a series of continuances, all of which were requested by the government and objected to by the petitioner, for the purpose of taking depositions of foreign witnesses which the government represented were "critical" to their case. At each court appearance at which a continuance was requested and granted by the district court, the district court judge made it clear that the continuances were being granted, and time was thereby being excluded under the Speedy Trial Act, so that these depositions could be scheduled and completed by the time of trial. However, by the time of the last scheduled trial date, May 11, 1981, no depositions had been taken, nor had they even been scheduled.

In ruling that the time period of the continuances was therefore not excludable under the Speedy Trial Act, the district court specifically found that the government had not acted with due diligence in attempting to obtain the depositions. Therefore the court, exercising its discretion, determined that the continuances were improvidently granted due to the government's failure to comply with the condition upon which they were granted.

Petitioner submits that the underlying issue in the instant case is whether a district court judge, when exercising his discretion to grant the government several "ends of justice" continuances pursuant to 18 U.S.C. §3161(h)(8)(A), may condition such continuances upon the performance of actions by the government which are relied upon in requesting and receiving the continuances. The question of the proper exercise of a district court's discretion is thus the true issue which is involved in the instant case; however, it is an issue which never was addressed by the Court of

Appeals in reaching its decision. The Seventh Circuit merely found that:

> There is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid ab initio if the reasons for which the continuance was granted turn out not to be the actual causes of the delay that the continuance allows. Contingencies not foreseen when the continuance was asked for and granted may arise that prevent the government from using the continuance for the purposes for which it was granted. If so, the court can refuse to grant further continuances; it can revoke or shorten the continuance; but it is not *required* to revoke the continuance with effect back to the original trial date. We are unwilling to read so inflexible a mandate into the Act. 666 F.2d at 1115. (Emphasis in original).

Petitioner is in agreement with the Court of Appeals that there is no provision of the Speedy Trial Act which *requires* a district court to revoke a continuance with effect back to the original date upon which it was granted. Likewise, there is nothing in the Speedy Trial Act which *prohibits* a district court from revoking a continuance back to the date upon which it was originally granted, if the court finds that the government has failed to satisfy the conditions upon which the continuances were granted.

In essence, the opinion of the Court of Appeals stands for the proposition that a district court, exercising its discretion under the Speedy Trial Act, does not have the authority to condition one or more continuances upon the exercise of due diligence by the government. A realistic and commonsense interpretation of the Act shows that quite the contrary is true.

Under 18 U.S.C. Section 3161(h)(8)(A), a district court judge is authorized to grant a continuance, if based upon "findings that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial." When considering the merits of such a requested continuance, the court is precluded, under 18 U.S.C. Section 3161(h)(8)(C), from granting such a continuance based upon "lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government." Under this section, it is clear that the district court is mandated not to grant a continuance based upon the lack of diligent preparation by the government. Therefore, it only logically follows that a district court is authorized to condition a continuance upon diligent preparation by the government.

The decision of the Court of Appeals in the instant case fails to recognize that under the clear provisions of the Speedy Trial Act, a district court has the discretion to condition a continuance upon the performance of actions represented by the party requesting the continuance to justify it. The import of their decision is that the government may request and receive a continuance under the Act, represent that the delay is necessary to adequate preparation for trial, but then fail to perform the actions upon which the continuance was requested, all without sanction under the Speedy Trial Act. Surely this result is not one which this court should countenance under the Act, and therefore certiorari should be granted to correct the erroneous interpretation of the Act by the Court of Appeals.

C. Conflict With Controlling Authority.

As stated by the Court of Appeals,

> The question on this appeal is whether the district judge had the power to vacate the continuance with retroactive effect and, if so, whether he abused that power in the circumstances of this case. 666 F.2d at 1115.

Unfortunately, the opinion never answers the question as thus stated, and in reaching the result which it does, ignores prior controlling case law which should have led to a different conclusion.

In *United States v. Aviles,* 623 F.2d 1192 (7th Cir. 1980), the Seventh Circuit squarely held that:

> The grant or denial of a continuance under the Speedy Trial Act remains a matter addressed to the sound discretion of the trial court, and the exercise of that discretion will not ordinarily be reviewed on appeal. 623 F.2d at 1196. (Citation omitted).

Despite this clearly controlling authority, the Court of Appeals created the artificial issue of whether the district court had the "power" to vacate the continuance which it originally granted. As established in *Aviles,* the trial court has the broad discretion to grant or deny a continuance. Therefore, it cannot be denied that a district court does have the "power" to vacate its own continuance, an ability which the Seventh Circuit either ignores or fails to recognize in its opinion. Their decision is directly at odds with *Aviles,* which is apparently the only case that has specifically addressed the issue under the Speedy Trial Act.

By ignoring controlling authority on the issue, the Court of Appeals has, in effect, substituted its judgment for that

of the district court in determining whether time should be excludable under the Speedy Trial Act. Under 18 U.S.C. §3161(h)(8)(A), the district court is bound with the duty to determine whether a continuance may be properly granted under the Act. *Aviles* teaches that this determination is addressed to the sound discretion of the district court, and therefore a district court decision is reversible only for a clear abuse of that discretion. In making its determination as to a continuance, the district court is further bound by 18 U.S.C. §3161(h)(8)(C), which provides that no continuance shall be granted by reason of lack of diligent preparation on the part of the government. The district court in the instant case made the determination that the period of delay caused by the continuances was due to lack of diligent preparation on the part of the government, and therefore determined that the time was not excludable under the Speedy Trial Act. Given this factual determination, it may be set aside only if clearly erroneous. *United States v. Wilkins,* 569 F.2d 775, 779 (7th Cir. 1981).

Instead of reviewing this case to determine whether the findings of the district court were clearly erroneous, and thereby determining whether the district court abused its discretion in revoking the continuances, the Court of Appeals justifies its reinstatement of the indictment by discussion of the fact that dismissal of the indictment will prevent the government from trying the defendants of serious crimes, and referring to sanctions for violations of the Act which do not involve "windfalls for lawbreakers." 666 F.2d at 1116. This discussion ignores the fact, however, that the Speedy Trial Act is not to be applied selectively simply because an appellate court determines that defendants are guilty of the crimes with which they are charged, and there-

fore dismissal of charges against them results in a benefit to which they are not entitled. Once a district court makes the determination that there has been a violation of the Act, the mandatory dismissal sanctions provided by 18 U.S.C. §3161(a)(2) are clear and unequivocal: "The information or indictment shall be dismissed on motion of the defendant..."

In addition to its failure to apply or consider the controlling authority of *Aviles*, and in failing to apply the proper standard of review to the district court's factual findings and legal conclusion, the Court of Appeals goes further and substitutes its own judgment for that of the district court by setting forth its perception of appropriate grounds for delay—grounds which are different from those which the government asserted and also different from those which were considered by the trial court. In discussing these newly-created justifications the Court of Appeals states:

> The unavailability of an essential witness is an independent ground for tolling the time limits in the Speedy Trial Act. See 18 U.S.C. §3161(h)(3)(A). This ground may well have been available to the government under the facts of this case; and certainly the absence of an essential witness is one of the factors that a trial court is entitled to consider in deciding whether to grant an excludable continuance. 666 F.2d at 1116.

The "essential witness" exception found in 18 U.S.C. §3161 (h)(3)(A) was not the provision which the government relied upon in obtaining continuances from the district court; likewise, the trial court did not rely upon its provisions in granting the continuances, but rather based them upon the "ends of justice" exception of 18 U.S.C. §3161(h)(8)(A). Thus the Court of Appeals, by finding another ground up-

on which the government could have relied in seeking the continuances, obviates the necessity of determining whether the district court abused its discretion in vacating the continuances where the government failed to perform the actions which were required in justification of the continuances which it obtianed. Aside from the fact that this "essential witness" exception was not relied upon by the government in the district court, the Court of Appeals further errs in failing to recognize that excludability pursuant to this provision must be determined pursuant to 18 U.S.C. §3161(h)(3)(B), which provides:

> For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

The only reported case which deals with the necessity of applying the "due diligence" standard of 18 U.S.C. §3161 (h)(3)(B) to an "essential witness" exclusion is *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981). In *Fielding*, the defendant challenged a thirty day continuance granted to the government on the basis that essential witnesses could not be located, sought and obtained pursuant to the "ends of justice" exclusion of 18 U.S.C. §3161(h) (8)(A). On appeal, the defendant claimed that the applicable provision was 18 U.S.C. §3161(h)(3)(A), since the continuance related to the absence of essential witnesses.

The defendant in *Fielding* attempted on appeal to do the same thing the government does in the instant case: invoke 18 U.S.C. §3161(h)(3)(A) as an "automatic" ground for excluding time so as to preclude the district court from exercising its discretion. In addressing this issue, the *Fielding* court stated:

> Appellant suggests that the standards of subsection (18 U.S.C. §3161(h)(3)(A), relating to unavailable witnesses, apply. . . . That section also prescribes the factors to be considered by the trial judge and is thus susceptible to the same analysis [as 18 U.S.C. §3161 (h)(8)(A)]. 645 F.2d at 721, n. 6. (Bracketed materials supplied).

Fielding thus makes it clear that for purposes of determining excludable delay under either 18 U.S.C. §3161(h)(3)(A) or Section 3161(h)(8)(A), it must be determined whether missing witnesses are truly unavailable, or whether the absence of due diligence on the part of the government is the true reason for their unavailability. The opinion of the Court of Appeals fails to recognize that the same "due diligence" determination must be made no matter which of the two cited provisions is relied upon for a continuance, directly contrary to the holding of *Fielding*. Thus, the court totally ignores the fact that the district court made a factual finding in the instant case that there was no due diligence on the part of the government. By ignoring this required determination, the court avoids application of the appropriate standard of review, thus placing their decision in direct conflict with *Fielding's* holding that a factual determination by a district court regarding excludable delay under the Speedy Trial Act may be set aside only if it is clearly erroneous. 645 F.2d at 722. Thus, by failure to make reference

to the plain wording of 18 U.S.C. §3161(h)(3)(B), and by failing to make reference to the only case which supports the plain meaning of that provision, the Court of Appeals announces a fundamentally erroneous statement of the law, in direct opposition to the only known authority which addresses the issue.

The Court of Appeals also discusses the process of plea negotiation as being another justification which could have been asserted in this case, stating:

> While plea bargaining is not an express ground for an excludable continuance, where, as here, it is undertaken for the purpose of obtaining substitute evidence for the testimony of an essential witness who is unavailable, the delay resulting from plea bargaining could properly be considered a delay caused by the unavailability of a witness. 666 F.2d at 1116.

Once again, the Court of Appeals has substituted its judgment for that of the district court, which specifically found that plea negotiation was not a basis for creating excludable delay under the Speedy Trial Act. Indeed, petitioner had taken the position throughout the course of proceedings in the district court that he would engage in plea discussions but was unwilling to waive any rights to which he was entitled under the Act. In addition, the government did not rely upon plea negotiation as a basis for excludable delay under the Act before the Court of Appeals.

Nowhere in the Speedy Trial Act is plea negotiations between the respective attorneys mentioned as a basis for excludable delay under the Act. Under 18 U.S.C. §3161(h)(1)(I), time during which a court considers a proposed plea agreement is excluded from computation of time under the Act; by negative implication, it is apparent that Congress

did not therefore intend the plea negotiation process itself to constitute any basis for excluding time under the Act. Further, cases which have considered the issue stand for the proposition that the plea negotiation process does not constitute a basis for excludable delay under the Act. See, *United States v. Carini*, 562 F.2d 144, 149 (2nd Cir. 1977); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 378 (2nd Cir. 1979). Thus, in reaching its determination that plea bargaining constitutes additional justification for excludable delay, the Court of Appeals has ignored available authority which stands for a contrary proposition.

Finally, the Court of Appeals appears to indicate that the sanction of dismissal for violation of the Speedy Trial Act is appropriate only where "the government has procured a continuance by deliberate misrepresentation and the delay caused by the continuance was seriously prejudicial to the defendant, . . ." 666 F.2d at 1116. Nowhere in the Speedy Trial Act, and nowhere in the reported case law, is there any suggestion or indication that government abuse is a prerequisite for dismissal under the Act, or that a defendant must make a showing of prejudice before he is entitled to dismissal. Congress has made clear its intent that the dismissal sanction of the Act is to be applied neutrally and even handedly, much like the statute of limitations. Upon a showing of violation of the Act, 18 U.S.C. §3161(a)(2) requires that an indictment "shall" be dismissed upon motion of a defendant. By its ruling, the Court of Appeals has engrafted onto this sanction provision additional considerations which are clearly neither intended nor appropriate. This legislative act, under the guise of the judicial appellate process, should not be allowed to go uncorrected.

CONCLUSION

In reaching its decision in the instant case, the Court of Appeals has ignored traditional notions of the appellate process by failing to decide the issues which are presented by an appeal and failing to apply available precedent in determining those issues. Instead of determining whether the district court made findings of fact which were clearly erroneous, and then deciding whether the district court properly exercised its discretion based upon those facts, the Court of Appeals has substituted its own perception of the facts established by the record. It reaches the result which it desires by ignoring the factual findings of the district court, and interpreting the Speedy Trial Act in a fashion which is consistent neither with the provisions of the Act itself nor with prior authority discussing the issues presented for review.

The facts of this case present issues of fundamental importance to the federal district judges who have the primary responsibility of administering the progress of criminal cases through their interpretation of the provisions of the Speedy Trial Act. As it stands, the decision of the Court of Appeals is an aberration under the Act, having been decided contrary to established authority, and providing no guidance to either the district courts or to litigants as to the scope of excludable delay under the Act. Finally, although recognizing that district courts are empowered to exercise discretion in controlling the activities of parties by conditioning continuances upon performance, the Court of Appeals has effectively denied the district court the power to sanction non-performance, a power which is given to the district court by the unequivocal provisions of the Speedy Trial Act.

The Sixth Amendment, Congress and petitioner deserve better.

For these reasons, we respectfully submit that this Court should grant certiorari to review this case.

FRIEDBERG & PETERSON
William M. Orth
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
Counsel for Petitioner

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ANTHONY M. CARLONE, AVIE COHEN and LEONARD BEDNARZ,
Defendants-Appellees.

No. 81-2012

United States Court of Appeals, Seventh Circuit

Argued Dec. 11, 1981
Decided Dec. 23, 1981

Rehearing Denied Jan. 29, 1982

Government appealed from order entered by the United States District Court for the Northern District of Illinois, Frank J. McGarr, Chief Judge, dismissing indictment for failure to comply with Speedy Trial Act. The Court of Appeals, Posner, Circuit Judge, held that: (1) Speedy Trial Act does not require that continuance valid when granted becomes invalid ab initio if reasons for which continuance was granted turn out not to be actual causes of delay that continuance allows, and (2) even if actual and ostensible causes of delay may not have coincided, facts did not reveal pattern of abuse that would justify revocation of continuance retroactively with effect of dismissing indictment with prejudice where there was no suggestion either that Government made deliberate misrepresentations in procuring continu-

ance or that defendants were in least bit prejudiced by delay that continuance caused.

Reversed and remanded.

1. Criminal Law 616

Nothing in Speedy Trial Act requires that continuance valid when granted becomes invalid ad nitio if reasons for which continuance was granted turn out not to be actual causes of delay that continuance allows; if contingencies arise, not foreseen when continuance was asked for and granted, that prevent government from using continuance for purposes for which it was granted, court can refuse to grant further continuances and can revoke or shorten continuance, but it is not required to revoke continuance with effect back to original trial date. 18 U.S.C.A. § 3161 et seq.

2. Process 168

Courts have broad and flexible power to prevent abuse of their processes.

3. Criminal Law 616

Alternative sanctions to retroactive revocation of continuance for government's misuse of time allowed include revoking or shortening continuance, with prospective effect only, refusing to grant further continuances, expressly conditioning grant of continuance on government's taking specified action according to prescribed timetable, and applying sanctions directly to counsel who commit knowing violations of Speedy Trial Act. 18 U.S.C.A. §§ 3161 et seq., 3162(b).

4. Indictment and Information 144.1(1)

In extreme case where, for example, government has procured continuance by deliberate misrepresentations and delay caused by continuance is seriously prejudicial to defendant, court would be acting well within powers expressly granted it by rule if it dismissed indictment without reference to time limits in Speedy Trial Act. 18 U.S.C.A. § 3161 et seq.; Fed. Rules Cr. Proc. Rule 48(b), 18 U.S.C.A.

5. Criminal Law 594(1)

Absence of essential witness is one of factors that trial court is entitled to consider in deciding whether to grant continuance excludable under Speedy Trial Act. 18 U.S. C.A. §§ 3161 et seq., 3161(h)(3)(A).

6. Criminal Law 577.10(4)

Although plea bargaining is not express ground for excludable continuance under Speedy Trial Act, where it is undertaken for purpose of obtaining substitute evidence for testimony of essential witness who is unavailable, delay resulting from plea bargaining could properly be considered a delay caused by unavailability of witness as ground for tolling time limits under Act. 18 U.S.C.A. §§ 3161 et seq., 3161(h)(3)(A).

7. Criminal Law 589(1)

Change of prosecutors is not per se invalid ground for excludable continuance under Speedy Trial Act; rather, continuity of government counsel is one of facts that court is required to consider in deciding whether to grant excludable continuance. 18 U.S.C.A. §§ 3161 et seq., 3161(h)(8)(A).

8. Criminal Law ©16

Even if actual and ostensible causes of delay may not have coincided, facts did not reveal pattern of abuse as would justify revocation of excludable continuance retroactively with effect of dismissing indictment with prejudice where there was no suggestion either that government made deliberate misrepresentations in procuring continuance or that defendants were in least bit prejudiced by delay that continuance caused. 18 U.S.C.A. § 3161 et seq.

Patty Merkamp Stemler, Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Peter Berman, Chicago, Ill., Joseph S. Friedberg, Minneapolis, Minn., for defendants-appellees.

Before CUMMINGS, Chief Judge, and SPRECHER and POSNER, Circuit Judges.

This appeal by the government from an order dismissing an indictment raises a question of first impression under the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, relating to the power of a district judge to vacate a continuance retroactively to the date when he granted it.

The indictment, filed on August 7, 1980, alleged that the defendants had violated a number of federal criminal statutes through a scheme devised and carried out in 1975. They shipped worthless goods from Illinois to Denmark, where the goods were stored in a warehouse owned by the city of Copenhagen. They insured the goods—whose value they overstated—with a Swedish insurance company. They then set fire to the warehouse, destroying the goods, and filed a claim with the insurance company for the inflated value.

Trial was originally scheduled for January 5, 1981. But in December 1980 the government learned that two of its key witnesses, a Swedish woman who had filed the insurance documents claiming damages for the destroyed shipment and a Danish insurance adjuster who had viewed the goods and found them to be worthless, were unwilling to come to the United States to testify—the adjuster because he feared for his life if he came. The government moved for a continuance, which the court granted to January 30. The court directed that the period of the continuance be excluded from the time within which the government had to try the defendants under the Speedy Trial Act. The continuance was subsequently extended to May 11.

The government now set about to get the testimony of the Scandinavian witnesses in some form. However, one of the witnesses was not available to be deposed during the entire month of February, and the lawyer for one of the defendants was unavilable during the whole of January to attend a deposition abroad. Some time was also lost when the government attorney handling the case resigned and was replaced. Hoping to avoid having to take depositions abroad, the government prepared stipulations of the foreign witnesses' testimony, but defense counsel would not agree to the stipulations.

The earliest date for the depositions that would suit everyone turned out to be April 20. But as the government's lawyer began to prepare the letters rogatory that would be necessary to take the depositions, she discovered that the cost to the government could be as much as $40,000. Since this would put a big crimp in the Justice Department's travel budget, she was urged by her superiors to negotiate a plea with one of the defendants in exchange for his cooperation;

it was felt that the evidence which a cooperating defendant would give would be an acceptable substitute for the foreign witnesses' testimony. Plea bargaining ensued, but collapsed on April 20. The government's lawyer then set about preparing letters rogatory in earnest. She presented them to the court for its signature some days prior to the May 11 status hearing, but the court objected to the form of the documents and ordered her to redraft them.

On May 11 the defendants renewed their objection to the continuance. The motion was heard on May 22, and at the conclusion of the hearing the court in an oral opinion granted the motion and vacated the continuance all the way back to January 5, the original trial date. Without exclusion of the period during which the continuance had been in effect, no time remained under the Speedy Trial Act to try the defendants, so the court also dismissed the indictment. The court did not indicate whether the dismissal was with or without prejudice, but this made no practical difference since the statute of limitations on the offenses charged in the indictment had now run.

The question on this appeal is whether the district judge had the power to vacate the continuance with retroactive effect and, if so, whether be abused that power in the circumstances of this case.

Under 18 U.S.C. § 3161(h)(8)(A), any delay caused by a continuance is excluded in determining the time limits within which a defendant must be tried "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Section 3161(h)(8)(B) is a nonexclusive list of factors that the judge is required to consider in deciding whether to

grant an excludable continuance. They include whether failure to grant it "would be likely to make a continuation of [the criminal] proceeding impossible, or result in a miscarriage of justice"; whether the case is "so complex . . . that it is unreasonable to expect adequate preparation for . . . the trial" within the time limits specified by the Act; and whether the failure to grant the continuance "would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." However, 18 U.S.C. §3161(h)(8)(C) provides that no excludable continuance "shall be granted because of . . . lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

When the district court granted the government's motion for a continuance in December 1980, it made the findings required by the Act for a continuance that creates excludable delay. But in its May 22 ruling, the court decided that the real reasons for the delay were not valid reasons under the Speedy Trial Act for an excludable continuance. The court stated that one reason for the delay was that the government had been trying to negotiate a plea, which the court said was not a basis for excludable delay. The other reasons that the court thought were invalid grounds for excludable delay were the efforts of the government attorney to save travel expenses, the change of government attorneys, the fact that the government "was having trouble with the bureaucracy in Washington," and the fact that the government "was having trouble with the Court, since I didn't like the format of the Letters Rogatory order and suggested that it

be re-drafted. None of these unfortunately, are adequate reasons for excludable time."

[1] The court apparently thought that if the actual causes of the delay in beginning the trial were not valid grounds for the grant of an excludable continuance, it *had* to vacate the continuance retroactively to the original trial date; the Speedy Trial Act, which the court said "takes us out of the real world," left him with no choice. We disagree. There is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid *ab initio* if the reasons for which the continuance was granted turn out not to be the actual causes of the delay that the continuance allows. Contingencies not foreseen when the continuance was asked for and granted may arise that prevent the government from using the continuance for the purposes for which it was granted. If so, the court can refuse to grant further continuances; it can revoke or shorten the continuance; but it is not *required* to revoke the continuance with effect back to the original trial date. We are unwilling to read so inflexible a mandate into the Act.

[2, 3] An alternative reading of the district judge's opinion is that he was revoking the continuance with effect back to the original trial date as a discretionary sanction for the government's misuse of the time allowed it by the continuance. Courts do have broad and flexible powers to prevent the abuse of their processes; but where, as here, the exercise of those powers results in forever precluding the government from trying defendants accused of serious crimes, there is a danger that it is the powers themselves that are being abused. To dismiss an indictment with prejudice, as the court in effect did here, is to punish not only the prosecutor but the entire law-abiding public. Alternative

sanctions are available that do not involve such windfalls for law breakers. They include, as we have already noted, revoking or shortening continuances, with prospective effect only; and refusing to grant further continuances. A judge could (but did not here) expressly condition the grant of a continuance on the government's taking specified actions according to a prescribed timetable. He also has the power to apply sanctions directly to counsel who commit knowing violations of the Speedy Trial Act. *See* 18 U.S.C. § 3162(b). Such sanctions have the attractive characteristic that they do not prevent punishment of criminals as a by-product of trying to prevent misconduct by government officers.

[4-8] We do not exclude the possibility that in appropriate cases, for example where the government had procured a continuance by deliberate misrepresentation and the delay caused by the continuance was seriously prejudicial to the defendant, the trial court could revoke the continuance retroactively as a sanction for the misconduct and a protection for the defendant. Indeed, in so extreme a case the court would be acting well within the powers expressly granted it by Rule 48(b) of the Federal Rules of Criminal Procedure if it dismissed the indictment without reference to the time limits in the Speedy Trial Act. This was not such a case. There is no suggestion either that the government made deliberate misrepresentations in procuring the continuance or that defendants were in the least bit prejudiced by the delay that the continuance caused. Indeed, it is not even clear that the reasons that the court in its opinion revoking the continuance said were invalid grounds for an excludable continuance really were invalid. The unavailability of an essential witness is an independent ground for tolling the time limits in the Speedy Trial Act. *See* 18 U.S.C. §

3161(h)(3)(A). This ground may well have been available to the government under the facts of this case; and certainly the absence of an essential witness is one of the factors that a trial court is entitled to consider in deciding whether to grant an excludable continuance. While plea bargaining is not an express ground for an excludable continuance, where, as here, it is undertaken for the purpose of obtaining substitute evidence for the testimony of an essential witness who is unavailable, the delay resulting from plea bargaining could properly be considered a delay caused by the unavailability of the witness. Nor was the change of prosecutors a *per se* invalid ground either, as the court seems to have thought; continuity of government counsel is one of the factors that the court is required by 18 U.S.C. § 3161(h)(8)(B) to consider in deciding whether to grant an excludable continuance. So the actual and ostensible causes of delay may in fact have coincided in this case; and if they did not, still the facts do not reveal a pattern of abuse that would justify a trial court in revoking a continuance retroactively with the effect of dismissing the indictment with prejudice.

We therefore reverse; and because we think that relations between the trial court and the prosecutor may have become frayed beyond repair by the events leading up to the court's order, pursuant to Circuit Rule 18 we remand the case to a different judge for further proceedings in the matter.

Reversed and Remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

January 29, 1982

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 81-2012

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ANTHONY M. CARLONE, AVIE COHEN and LEONARD BEDNARZ,
Defendants-Appellees.

Appeal from the Unitetd States District Court for the Northern District of Illinois, Eastern Division.

No. 80-CR-456

Frank J. McGarr, *Judge*

The defendants-appellees, Anthony M. Carlone, Avie Cohen and Leonard Bednarz, filed a petition for rehearing on January 13, 1982. All of the judges of the original panel have voted to deny the petition, and it is therefore DENIED.